

APPEAL NO. 991434

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on June 15, 1999. The issues at the CCH were whether the respondent (claimant) sustained a compensable injury on \_\_\_\_\_, whether the claimant had disability, and the claimant's average weekly wage (AWW). The hearing officer determined that the claimant sustained a compensable injury while in the course and scope of employment on \_\_\_\_\_, that the claimant had disability from November 16, 1998, through the date of the CCH, and that the claimant's AWW is \$409.23. The appellant (carrier) appeals, urging that the hearing officer's decision is against the great weight and preponderance of the evidence and should be reversed. The claimant replies that the hearing officer's decision is supported by sufficient evidence and should be affirmed, and that the carrier failed to notify the claimant's attorney of their request for review.

DECISION

Affirmed.

The claimant's response to the carrier's appeal states that the carrier notified the claimant of the request for review, but failed to notify the claimant's attorney. This is confirmed by the carrier's certificate of service on the carrier's request for review which indicates that a copy was sent only to the claimant. Section 410.202(a) requires that a party serve a copy of the appeal on the other party, not on the attorney representing the other party. *See also* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3(a)(4) (Rule 143.3(a)(4)). While a party represented by an attorney should serve a copy of an appeal on the other party's attorney as a matter of professional courtesy, this is not required.

The claimant testified that she had previously worked in the banking industry for approximately five years through June 5, 1998; that in October 1998 she went into employer's bank branch office, obtained an application, and mailed in a completed application; that on October 29th or 30th, human resources called her and offered her a bank agent position at a branch office; that she accepted the position at a salary of \$1,700.00 per month; that she was instructed to report to a particular bank office to complete her new hire package; that on \_\_\_\_\_, she reported to the bank office and met with Ms. B, an administrative assistant in human resources; that she completed her new hire paperwork, including her I-9, W-2, and fingerprints; that after completing her new hire paperwork, Ms. B informed her that the bank would like her to open an account with the bank so that her payroll check could be directly deposited into her bank account; that Ms. B told her that she could just go to the new accounts department and walked with her to the new accounts department; that as she and Ms. B were walking to the new accounts department, she fell on slippery tile, injuring her low back and right shoulder; that she opened a new account and gave Ms. B a voided check to be included in her new hire package; that she was told to report to work on November 9th or 10th; and that she worked until November 16, 1998, when she was unable to continue due to low back and arm pain.

The claimant asserted that she was unable to work from November 16, 1998, through the date of the CCH.

The carrier argues that the claimant was not in the course and scope of employment because she was not furthering the business affairs of the employer when she fell: she was on her way to open a personal bank account after she had completed pre-employment paperwork, she was not required to open a personal bank account as a condition of her employment, and she was offered several options for receiving her wages. The claimant testified on cross-examination that having an employer's account was not a condition of her employment and she did not feel that she would lose her job if she did not have a bank account with employer.

There was no dispute that the claimant was injured when she fell on \_\_\_\_\_. What is at issue is whether or not the claimant was in the course and scope of employment when she fell. The claimant had the burden of proof on this issue. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). The definition of course and scope of employment includes an activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer. Section 401.011(12).

The hearing officer made a finding that the parties stipulated that on \_\_\_\_\_, the claimant was the employee of (employer). The carrier asserts on appeal that it did not make such a stipulation. Review of the record indicates that such stipulation was proposed but rejected by the carrier. The parties stipulated that if it were determined that the claimant was in the course and scope of her employment, then the employer would be employer. We reform Finding of Fact No. 1A and list it as a finding of fact, not a stipulation.

The carrier asserts that Texas Workers' Compensation Commission Appeal No. 961159, decided July 29, 1996, is factually similar to this case. In Appeal No. 961159, we affirmed the determination that an injured worker who was injured completing a pre-employment agility test was not the employer's employee because the test was a prerequisite to employment. Unlike Appeal No. 961159, the facts of this case indicate that at the time of the injury the claimant had been offered the position, accepted the position, and had completed her new-hire paperwork. The record supports the determination that on \_\_\_\_\_, the claimant was an employee of employer.

In Texas Workers' Compensation Commission Appeal No. 980588, decided May 7, 1998, the Appeals Panel cited two Texas Court cases concerning injuries resulting from supervisor instructions. We noted that Saint Paul Insurance Company v. Van Hook, 533 S.W.2d 472 (Tex. Civ. App.-Beaumont 1976, no writ), stated that if an employee is following instructions from his supervisor, he is in the course of employment, even if not doing his usual tasks. We also noted that the Supreme Court of Texas applied a test of reasonableness in Biggs v. United States Fire Insurance Company, 611 S.W.2d 624 (Tex. 1981). In that case, a law clerk regularly performed personal errands for a partner and associates and sustained an injury while performing a personal errand for an associate.

The Supreme Court noted that under the "temporary direction" rule (citing an article of the predecessor statute similar to Section 401.012(b)(1)), compensability may follow when "the employer" authorized the task; the Court also referred to a claimant being "directed" to do the task. Regarding authority, the Court stated the claimant "must establish conduct by the principal that would lead a reasonably prudent person to believe that the agent has the authority" to direct.

Conflicting evidence was presented as to whether the claimant was directed to open a personal checking account. According to the claimant, she was not given any options for obtaining her paycheck, and Ms. B directed her and went with her to open an account. According to the affidavit of Ms. B, the claimant was given several options as to how she wanted to receive her paycheck, and Ms. B did not encourage the claimant to open a personal bank account with employer. This presented a factual question for the hearing officer to resolve. The hearing officer was the sole judge of the weight and credibility to be given the evidence. Section 410.165(a). She resolved contradictions in the evidence for the claimant and found that on \_\_\_\_\_, the claimant was engaged in an activity that had to do with or originated in the work, business trade, or profession of the employer when she was directed to open a personal checking account in order to facilitate employer's payment of wages, and fell. When reviewing a hearing officer's decision we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). We find there was sufficient evidence to support the determination of the hearing officer that the claimant sustained a compensable injury on \_\_\_\_\_, while in the course and scope of her employment.

The carrier appeals the hearing officer's determinations of AWW and disability, asserting that the claimant did not sustain a compensable injury and therefore did not have disability. Given our affirmance of the hearing officer's determination that the claimant sustained a compensable injury on \_\_\_\_\_, the claimant could establish disability. The claimant testified that as a result of her injury, she was unable to work from November 16, 1998, through the date of the CCH. Whether disability exists is a question of fact for the hearing officer to decide and can be established by the testimony of the claimant if found credible. Texas Workers' Compensation Commission Appeal No. 93560, decided August 19, 1993. We find the evidence sufficient to support the hearing officer's finding of disability. The carrier did not state a basis for appealing the hearing officer's determination that the AWW is \$409.23. The AWW was based on the employer's wage statement of a same or similar employee and is sufficiently supported by the evidence.

The decision and order of the hearing officer are affirmed.

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Dorian E. Ramirez  
Appeals Judge

CONCUR:

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Joe Sebesta  
Appeals Judge

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Susan M. Kelley  
Appeals Judge